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In The

Supreme Court of the United States

October Term, 1978

No. 78-1654

PETER BRANTI, As Public Defender
of Rockland County

Petitioner,

vs

AARON FINKEL AND ALAN TABAKMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

(Numbers in Parenthesis refer to pages in Petition unless otherwise noted)

This is an action pursuant to Section 1983 U.S.C. as interpreted by this Court in Elrod vs Burns, 427 U.S. 347, (1976) resulting from Petitioner's refusal to continue Respondents' employment solely because they failed to obtain sponsorship by a member of the majority Party

of the Rockland County Legislature.

The Public Defender of the County of Rockland is appointed by the County Legislature and serves a six-year term. Nominally, at least, appointments to the position of Assistant Public Defender are solely his province. Respondent FINKEL was appointed to that position in 1971 by the then Democratic Public Defender, Arnold Becker, and continued working in that position throughout the six-year term of Frank Barone, Becker's Republican appointed successor. Respondent TABAKMAN was appointed by Barone in 1975. Respondent TABAKMAN was a registered Republican at the time of his appointment; Respondent FINKEL was a registered Republican at the time of his appointment but changed his registration in February of 1977. However, Respondent FINKEL was regarded by the relevent parties to be a Republican during the period herein in issue (28a FN.2).

Having been apprised by the media of the

impending appointment of Petitioner as Public Defender, Respondents, on December 30, 1977, advised the Petitioner of their intent to exercise their Constitutional rights pursuant to this Court's decision in Elrod vs Burns and requested Petitioner, based upon that authority, to continue Respondents in their employment. Despite this request, on January 3, 1978, Petitioner, upon assuming the office of Public Defender, refused to continue Respondents in their former positions as Assistant Public Defenders and, in fact, attempted to replace them with registered Democrats. All of the Assistant Public Defenders appointed by Petitioner were sponsored by the Democratic caucus of the Rockland County Legislature or members thereof; eight of the nine appointees were Democrats.

On January 4, 1978, learning that their legitimate expectation of continued employment, Perry vs Sinderman, 408 U.S. 593 (1972), had

been rejected by Petitioner, Respondents commenced this action by way of Temporary Restraining Order and, thereafter, a plenary trial was held and a permanent injunction granted by the District Court. In the interim, pursuant to the terms of the Temporary Restraining Order, Respondents continued to receive their bi-weekly salary checks from the County of Rockland until the month of May, 1978, although they were not assigned any duties by Petitioner. At that time Petitioner's attorney hit upon the legally questionable device of issuing Respondents' checks pursuant to the Temporary Restraining Order of the District Court, but holding them "in escrow" pending a final determination of this matter on the merits. Thereafter, in October of 1978, Petitioner found that he had exceeded the amount allocated by the County Legislature for his 1978 budget inasmuch as he was paying two additional Assistant Public Defenders and, at that point, reinstated Respondents as Assistant Public Defenders, a position

in which they continue to serve, in exemplary fashion, to this day.

Petitioner appealed the District Court Order to the Second Circuit Court of Appeals, which unanimously affirmed the District Court and inter alia, disposed of the argument presented on Pages 6 and 7 of the Petition herein as follows, "The exempt class is defined in the Civil Service Rules and Regulations (Section 2.1[a]) as follows, 'Positions in the exempt class are those, other than unskilled labor positions, for which competitive examinations or other qualification requirements are not practicable.' It was even asserted at oral argument that an Assistant Public Defender is called a policy-maker by the Civil Service Regulations. Our research has not led to any verification of this assertion; nothing of this sort has been found in the Regulations." (4a).

REASONS FOR DENIAL OF CERTIORARI

It is respectfully submitted that this case does not meet the appropriate test set forth in

Rule 19 of the Rules of this Court for granting of Certiorari.

I. There is no conflict among the Federal Circuits.

Petitioner urges this Court that the Fourth Circuit's decision in Ramey vs Harber, 589 F. 2nd 753 (1978) reversing the District Court's decision in favor of plaintiffs who were not rehired to their positions as Deputy Sheriff, constitutes a conflict between the Fourth and Second Circuits. However, even a cursory reading of the majority decision of the Fourth Circuit clearly indicates that the sole reason for the reversal was the Fourth Circuit's refusal to apply Elrod retroactively as the District Court had done. "Although there is some doubt regarding the application of Elrod in this case, it is unnecessary to decide that question in view of our conclusion on the issue of retroactivity. Therefore, for the purposes of disposing of this litigation, we assume without deciding that Elrod is applicable." (Emphasis supplied). Indeed, Circuit Judge HALL

expressed his dissent solely "because I feared that the majority opinion may be read to imply that Elrod would apply prospectively on facts similar to this case * * *." (Page 761). The refusal of Sheriff Harber to reappoint Deputies who had campaigned against him occurred before this Court's decision in Elrod vs Burns. However, the opposite is true in the case sub-judice. This Court decided Elrod in 1976; Petitioner's attempted abrogation of Respondents' First Amendment rights did not occur until January, 1978 and, in fact, Petitioner was advised by Respondents of their intention to rely on this Court's holding in Elrod should he persist in his efforts to deny them their jobs as Assistant Public Defenders solely because of their lack of majority Party sponsorship.

II. There is no issue of Federal Law involved which should be settled by this Court.

The plurality decision in Elrod, strictly followed by the District and Circuit Judges herein, constitutes a clear Constitutional mand-

ate to all lower Courts. This Court should not be called upon to sit in factual review each time the classification of plaintiff changes from Deputy Sheriff to Janitor or to Assistant Public Defender. Factual findings are the province of the District Court; indeed, Trial Court findings of fact and conclusions of law must be affirmed by Appellate Courts absent the definite and firm conviction that a mistake has been committed. United States vs U. S. U. S. Gypsum Company, 333 U.S. 364 (1948).

III. There is no conflict between the Circuit Court decision and applicable decisions of this Court.

As pointed out in II supra, the District Court stated the narrow issue to be decided in quoting from Mr. Justice STEWART'S concurrence in Elrod as follows, "Are plaintiffs non-policy making, non-confidential government employees, who, solely for political reasons, are threatened with removal from jobs they are competent to perform and have been satisfactorily performing?" Thereafter, as an evidentiary finding, District Judge BRODERICK stated, "On the basis

of the evidence presented at the hearing and the applicable law, I find that the answer to this question is Yes * * *." Far from being in conflict with the applicable decisions of this Court, this decision is in complete consonance with the holding in Elrod.

IV. There has been no departure from the accepted and usual course of Judicial proceedings, either by the Circuit or District Court.

For the reasons expressed in II and III supra, it is again apparent that the District Court in deciding and the Circuit Court in affirming Respondents' Constitutionally protected right of free speech have followed the decisions of this Court.

V. The Second Circuit's affirmance herein does not extend the holding in Elrod vs Burns.

Petitioner would urge this Court that attorneys are, in effect, ipso facto either confidential, policy-making, or both. In fact, the argument presented on Page 10 of the Petition would exclude all attorneys from the protective

umbrella of Elrod. We reiterate that this is not the law, nor the intent of this Court. In Newcomb vs Brennan, 558 F. 2nd 825 Cert. Denied 434 U.S. 968 (1977), the Circuit Court for the Seventh Circuit distinguished between policy-making functions of plaintiff Deputy City Attorney and the non-policy-making functions of of the Civil Service Assistant City Attorneys who were supervised by plaintiff Newcomb. The Court there, in assessing the applicable standard under Elrod, took into account the fact that plaintiff Newcomb was personally appointed by the City Attorney to supervise Assistant City Attorneys; that he was in line to succeed the Mayor of the city, and that he exercised a supervisory capacity over other attorneys under him. Nowhere did the Court even intimate that the mere fact that he was an attorney automatically placed him in a policy-making or confidential position.

VI. Issues of Policy-making and confidentiality must be decided on a case-by-case basis.

Respondents agree with the citation from the Harvard Law Review contained in the Petition as well as the citation of Judge CAMPBELL's concurrence in Illinois State Employees Union Council 34 vs Lewis, 473 F. 2nd 561 (7th Cir. 1972) Cert. Denied 410 U.S. 928 (1973), that the applicability of Elrod must be determined on a case-by-case basis. The concurrence of Judge CAMPBELL that any employee engaged directly or indirectly in the formulation or implementation of the policies of the particular governmental office or agency falls without the Elrod protection supplies the appropriate parameter. The District Court in the case at bar specifically found that plaintiffs are non-policy-making, do not act as advisors or formulaters of plans for the implementation of broad goals of the office (21a) and further, that Respondents were not confidential employees within the relevent sense (22a-23a).

The Circuit Court unanimously affirmed, having "no doubt that Judge BRODERICK was correct in concluding that an Assistant Public Defender was neither a policy-maker nor a confidential employee." (4a). Petitioner, seeking to overturn a factual finding of a trial Court, dependent upon testimony involving candor and credibility, has a great burden to overcome. United States vs United States Gypsum Company, supra. We respectfully submit that Petitioner falls woefully short of meeting that burden.

VII. The requirement of political sponsorship for government employment violates Respondents' Constitutional rights.

Petitioner argues that the necessity for obtaining sponsorship for governmental employment does not deprive anyone of his Constitutional rights (13). However, one of the findings of the Court in Elrod was that Respondents were discharged from their employment because

they "did not support and were not members of Democratic Party and had failed to obtain the sponsorship of one of its leaders." (Emphasis supplied). Indeed, on Page 355 the Court, setting out the costs of the practice of patronage includes "sponsorship" with the other evils proscribed.

The argument that Respondents do not come into Court with clean hands, having been appointed through the political system which they allegedly attack, is not only false but irrelevent. Obviously, any political appointee bringing an action of this type would have been appointed by the very system which was found to be Constitutionally impermissible in Elrod. Indeed, if this was the standard to be applied, this Court would not have rendered its decision in Elrod.

However, there is a further distinction. Testimony taken before the District Court indicates that, since the position of Public

Defender was created in the County of Rockland it has been held, successively, by a Democrat, a Republican and now by Petitioner, a Democrat. The testimony clearly indicates that the predecessors of Petitioner both administered the office without regard to the political affiliation of Assistant Public Defenders; indeed, Respondent FINKEL, then a Republican, was appointed by Democratic Public Defender Arnold Becker. Only Petitioner has attempted this brazen and callous political manipulation of the fiduciary position of defender of the indigent. Only Petitioner has failed to appoint even one member of the opposing major political Party in Rockland County. Who comes into Court with unclean hands?

VIII. Petitioner's "same decision anyway" defense was a post hoc fabrication without substance.

On January 6, 1978, testifying in opposition to Respondent's application for a Temporary Restraining Order, Petitioner characterized

Respondent FINKEL as "A competent attorney * * *. I like Mr. FINKEL, Mr. FINKEL, in my opinion is a wonderful person * * *." Respondent TABAKMAN was also characterized as a competent attorney. A month later, on February 14th, Petitioner, for the first time, contended that factors other than the political process played a part in his determination not to retain Respondents. This obvious reversal of position was characterized by the District Judge as "A post hoc rationalization that defendant devised late in the hearing process in an effort to thwart what was apparently perceived to be plaintiffs' promising development of the case." (25a). Petitioner was further gently chastised by the District Court in Footnote 11 (32a), "At the second set of hearings BRANTI, apparently believing that the case was not going well, changed his testimony. I do not credit his later testimony, which was apparently structured to meet the perceived

needs of the litigation as it developed."

Findings of a trial Court, when dependent upon oral testimony where the candor and credibility of the witnesses can best be judged, have great weight with Appellate Courts. United States vs United States Gypsum, supra. Petitioner has had full opportunity, unlike Givhan vs Western Line Consolidated School District, - U.S. - 58 LEd 2nd 619 (1979) to raise the "same result anyway" defense set forth by this Court in Mount Healthy City Board of Education vs Doyle, 429 U.S. 274 (1977). This testimony as to "other reasons" for failure to continue Respondents in employment was rejected in toto by the Trial Judge who found defendants' failure to be reappointed due solely to their political beliefs. (25a).

CONCLUSION

Petitioner essentially seeks leave to reargue factual issues decided against him by both the District and Circuit Courts below. It is

certainly not the proper function of the highest Court of the United States to grant Certiorari to every disappointed litigant who claims that his case is factually different from the legal principles enunciated by this Court. To do so would result not only in chaos in the administration of justice at the apex of the Federal Court System, but would, effectively, deprive this Court of the time required for formulating the broad principles of law required for the guidance of lower Courts. This application for Writ of Certiorari should be denied.

Respectfully submitted,

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